LUXOR HOLDINGS SDN BHD

v.

HAINAL-KONYI (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO. W-02-390-2000]
29 MARCH 2006

PROFESSIONS: *Engineers - Registration - Section 7A Registration of Engineers Act 1967 - Engineering practice by bodies corporate - Whether a temporary professional engineer can be a shareholder or director of such body corporate*

CONTRACT: *Illegality - Contravention of law - Contract executed in contravention of Registration of Engineers Act 1967 - Whether null and void*

CONTRACT: *Breach - Consultancy agreement - Failure to assign registered engineer under consultancy agreement*

CONTRACT: *Breach - Termination - Whether court can consider events subsequent to termination date to establish breach*

The appellant/defendant engaged the respondent/plaintiff as their consultant civil and structural engineer. For the appellant's project, the respondent assigned their two engineers, Azman Ahmad and Lim Joo Kiat ('DW2'), to look after the project. However, before the project was completed, Azman Ahmad and DW2 resigned from the respondent company. As a result, on 7 May 1996, the appellant gave notice to the respondent to terminate the contract and requested the respondent to submit the invoices for all works done up to the date of termination. The respondent submitted their final invoice for the sum of RM393,750, *ie*, the total amount stated under the contract minus RM36,750 already paid by the appellant. The respondent claimed that since the appellant unilaterally terminated the contract, the appellant should pay the balance of the amount stated in the contract. The appellant refused to pay this sum and the respondent instituted the present action for breach of contract claiming the sum of RM393,750.

The appellant, on the other hand, claimed that the termination was justified because the respondent was in breach of the contract when no registered engineer was appointed to the project when Azman Ahmad and DW2 resigned. When DW2 tendered his resignation, there was only one registered engineer left with the respondent, *ie*, PW2 (Wong Loo Min). PW2 was, at that time, assigned to the respondent's projects in Johor Bahru and Singapore which were still going on. One Mohd Nazari Khalidun was appointed as a registered engineer with the respondent only about one month after the resignation of DW2. The appellant also contended that the agreement between the appellant and the respondent was null and void due to illegality because it contravened the Registration of Engineers Act 1967 ('the Act'). The contract was negotiated and executed by one Hendra Wahjudi ('PW1') on behalf of the respondent. PW1 designated himself as a director of the respondent. PW1, at the material time, was only a temporary registered engineer under the Act and as such he could only be an employee of the respondent in respect of the project named in the certificate. With the coming into force of s. 7A of the Act, several prohibitions and restrictions were introduced, one of which had the effect of disqualifying PW1 from being a shareholder or director of the respondent.

Held (allowing the appeal)
Per Mokhtar Sidin JCA:

(1) PW1 had no authority to negotiate and execute the contract. When the Act was amended, he was prohibited from being a shareholder, a director or an officer of the respondent. The agreement with the appellant was concluded by PW1 on behalf of the respondent. The Act did not permit him to do so. For that reason, the agreement was illegal. (paras 16 & 18)

(2) The first breach by the respondent was in respect of the two engineers assigned to the appellant's project. When Azman left, the respondent failed to assign another registered engineer to take his place. When DW2 tendered his resignation, the respondent did not name his replacement. By not naming the replacement of DW2, there was no consultant engineer assigned to the appellant's project. The respondent did not assign any engineer until the appellant terminated the agreement. This was the second breach by the respondent. In view of the breaches by the respondent, the appellant was entitled to terminate the agreement. (paras 23, 24 & 25)

(3) The learned judge was in error to assume that Mohd Nazari would be assigned to the appellant's project. The learned judge should have considered the events on the termination day and before, and not subsequent to, the termination date. (para 29)

(4) PW2's name came up as a replacement for DW2 only during the trial and not before. However, because there was only one registered engineer left with the respondent and he was committed to other projects in Johor Bahru and Singapore, it was not possible for him to take over from DW2. (para 33)

Bahasa Malaysia *translation of headnotes*

Perayu/defendan telah melantik responden/plaintif sebagai jurutera perunding sivil and struktural mereka. Untuk projek perayu, responden telah menugaskan Azman Ahmad dan Lim Joo Kiat ('DW2'), dua jurutera mereka, untuk menjalankan projek tersebut. Walau bagaimanapun, sebelum projek tersebut diselesaikan, Azman Ahmad dan DW2 telah meletak jawatan dalam syarikat responden. Lanjutan daripada ini, pada 7 Mei 1996, perayu telah memberikan notis kepada responden untuk menamatkan kontrak tersebut dan telah meminta responden mengemukakan invois-invois untuk semua kerja-kerja yang telah dilaksanakan sehingga tarikh penamatan itu. Responden telah mengemukakan invois akhir mereka untuk sejumlah RM393,750, iaitu jumlah keseluruhan di bawah kontrak tersebut tolak RM36,750 yang telahpun dibayar oleh perayu. Responden mengatakan bahawa oleh kerana perayu telah menamatkan kontrak tersebut secara unilateral, perayu perlu membayar baki jumlah amaun yang dinyatakan di dalam kontrak tersebut. Perayu telah enggan membayar jumlah tersebut dan responden telah memulakan tindakan ini untuk kemungkiran kontrak dan menuntut sejumlah RM393,750.

Perayu, sebaliknya, mengatakan bahawa penamatan itu adalah betul kerana responden telah mengingkari kontrak tersebut apabila tiada jurutera berdaftar ditugaskan di dalam projek tersebut selepas Azman Ahmad dan DW2 meletak jawatan. Apabila DW2 meletakkan jawatannya, hanya terdapat seorang jurutera berdaftar yang tinggal dengan responden, iaitu PW2 (Wong Loo Min). PW2, pada ketika itu telah ditugaskan kepada projek-projek responden di Johor Bahru dan Singapura yang masih sedang berjalan pada masa itu. Seorang bernama Mohd Nazari Khalidun telah dilantik sebagai jurutera berdaftar di syarikat responden hanya

lebih kurang sebulan selepas perletakan jawatan oleh DW2. Perayu juga berhujah bahawa perjanjian di antara perayu dan responden adalah taksah dan batal atas alasan kepenyalahan undang-undang kerana ia melanggari Akta Pendaftaran Jurutera 1967 ('Akta tersebut'). Kontrak tersebut telah dibincangkan dan ditandatangani oleh Hendra Wahjudi ('PW1') bagi pihak responden. PW1 telah mengenali dirinya sebagai pengarah responden. PW1, pada masa itu, adalah hanya seorang jurutera berdaftar sambilan di bawah Akta tersebut dan oleh itu dia hanya boleh menjadi seorang pekerja responden di dalam projek yang dinamakan di dalam sijil yang berkenaan. Dengan berkuatkuasanya s. 7A Akta tersebut, beberapa larangan dan sekatan telah diperkenalkan, salah satu daripadanya mempunyai efek menghalang PW1 daripada menjadi pemegang saham atau pengarah responden.

Diputuskan (membenarkan rayuan)
Oleh Mokhtar Sidin HMR:

(1) PW1 tidak mempunyai kuasa untuk membincangkan dan menandatangani kontrak tersebut. Apabila Akta tersebut dipinda, dia telah terlarang daripada menjadi pemegang saham, pengarah atau pegawai responden. Perjanjian dengan perayu telah dibuat oleh PW1 bagi pihak responden. Akta tersebut tidak membenarkannya berbuat demikian. Oleh yang demikian, perjanjian itu adalah menyalahi undang-undang.

(2) Pengingkaran yang pertama oleh responden adalah berkenaan dengan penugasan dua orang jurutera dalam projek perayu. Apabila Azman meletak jawatan, responden telah gagal menugaskan seorang jurutera berdaftar yang lain untuk mengambil tempatnya. Apabila DW2 meletak jawatannya, responden tidak menamakan penggantinya. Dengan tidak menamakan pengganti DW2 tidak ada jurutera perunding yang ditugaskan kepada projek perayu. Responden tidak menugaskan mana-mana jurutera sehingga perayu menamatkan perjanjian itu. Ini adalah kemungkiran kedua oleh responden. Memandangkan kemungkiran-kemungkiran oleh responden, perayu berhak untuk menamatkan perjanjian tersebut.

(3) Hakim yang bijaksana telah khilaf dalam mengganggap yang Mohd Nazari akan ditugaskan kepada peojek perayu. Hakim yang bijaksana sepatutnya mengambilkira kejadian-kejadian pada hari penamatan dan sebelum, dan bukan selepas, hari penamatan.

(4) Nama PW2 telah dikemukakan sebagai pengganti bagi DW2 hanya semasa perbicaraan dan bukan sebelumnya. Walau bagaimanapun, oleh kerana hanya terdapat seorang jurutera berdaftar yang tinggal dengan responden dan dia telah ditugaskan kepada projek-projek lain di Johor Bahru dan Singapura, adalah tidak berkemungkinan untuknya mengambil-alih daripada DW2.

Case(s) referred to:
John B Skilling & Ors v. Consolidated Hotels Ltd [1979] 2 MLJ 2 ***(refd)***
Raymond Banham & Anor v. Consolidated Hotels Limited [1976] 1 MLJ 5 ***(refd)***

Legislation referred to:
Professional Engineers' Act, ss. 18, 19
Registration of Engineers Act 1967, ss. 2, 7(1), 7A(1), (3), 10A

For the appellant - RR Sethu; M/s Azariah & Assoc
For the respondent - Saw Lip Hean (Ong Chee Kwan with him); M/s Saw & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-621-1996]

Reported by Amutha Suppayah

JUDGMENT

Mokhtar Sidin JCA:

[1] The appellant (the defendant in the court below) engaged the respondent (the plaintiff in the court below) as their consultant civil and structural engineer. The appointment was made through a letter dated 14 November 1995 which the parties agreed to be the contract. The contract was for a lump sum of RM410,000 comprising of RM242,000 for alternative structural design and RM168,000 for the scope of services under Part A Condition of Engagement, Board of Engineers Malaysia (BEM). Apparently, the structural design by the previous consultant was discarded and the structural design by the respondent was adopted. For the appellant's project, the respondent assigned Azman bin Ahmad and Lim Joo Kiat (DW2), their two engineers to look after the project. On 17 April 1996, DW2 gave a three months notice to the respondent to resign in accordance with his contract of service. Before that, Azman bin Ahmad had left the respondent and set up his own consultant firm known as ANZ Sdn Bhd. When the

said DW2 tendered his resignation, the relationship between DW2 and the respondent was not cordial anymore because of some accusations and allegations by the respondent in particular by Hendra Wahjudi. DW2 denied the allegations and as a result DW2 left the respondent before the three months lapsed. DW2 then joined Azman bin Ahmad and the firm's name of ANZ Sdn Bhd was changed to Azman, Lim & Associates, where both Azman bin Ahmad and Lim Joo Kiat were the substantial shareholders and the only directors.

[2] On 7 May 1996, the appellant gave notice to the respondent to terminate the contract and also informed the respondent that the appellant wished to change their consultants. The appellant then requested the respondent to submit the invoices for all works done up to the date of termination. On 27 May 1996, the appellant proceeded to appoint the firm of Azman, Lim & Associates as their new consultant. On 15 August 1996, the respondent submitted their final invoice for the sum of RM393,750, ie, the total amount stated under the contract minus RM36,750 already paid by the appellant. The RM36,750 consisted of RM35,000 as fees and the balance 5% service tax. On 9 September 1996, the appellant wrote back stating their refusal to pay the amount claimed by the respondent and again requested the respondent to itemise the claims. By their letter dated 4 September 1996 the respondent refused to itemise the invoice and claimed that since the appellant unilaterally terminated the contract, the appellant should pay the balance of the amount stated in the contract. By this letter, I am of the view that the respondent are seeking damages for breach of contract and not for works done under the contract.

[3] The respondent instituted the present action when the appellant failed to pay the amount claimed by the respondent. The statement of claim shows that the respondent's claim was for breach of contract in the sum of RM393,750. The respondent claimed that the termination was unlawful, null and void and the respondent are entitled to recover the full amount under the contract.

[4] The appellant in their statement of defence stated as follows:

> 1. The defendant used the services of the plaintiff on the basis that the engineers employed by the plaintiff were registered with the Board of Engineers Malaysia (BEM) in accordance with the Registration of Engineers Act 1967.

2. The plaintiff had failed to carry out its obligations stipulated in the letter of 14.11.95 and is in breach of the said agreement, particulars of breach are as follows:

(a) The plaintiff had at all material times used the services of an engineer by the name of Lim Joo Kiat to oversee the project works. Lim Joo Kiat was an engineer registered with the BEM.

(b) By the month of April or May 1996, Lim Joo Kiat and Azman Ahmad, both registered engineers of BEM with the plaintiff company had resigned.

(c) As a result of the resignations of Azman Ahmad and Lim Joo Kiat the plaintiff did not have the expertise and registered engineers to carry on with the work as civil and structural consultants for the project.

(d) The plaintiff did not appoint other registered engineers to take over conduct of the project and caused the contractor and other workers involved in the project not to be able to proceed with their work.

(e) The defendant then requested the plaintiff to obtain the services of other registered engineers to carry on with the work but the plaintiff failed to do so.

(f) On the basis of the plaintiff's failure to obtain the services of qualified and registered civil and structural engineers to carry on with the project work, the defendant terminated the plaintiff's services vide their letter of 7.5.96.

[5] The respondent's/plaintiff's claim in the present appeal is that the appellant/defendant had wrongfully terminated the contract and as a result the respondent is entitled to the full sum under the contract. The appellant, on the other hand, claimed that the termination was justified because the respondent was in breach of the contract when no registered engineer was appointed to the project when Azman bin Ahmad and DW2 resigned. The appellant in their letter terminating the services of the respondent also informed the respondent that they would be appointing a new consultant engineer in place of the respondent. The appellant made no secret that they wanted DW2 to be the consultant. Though there is nothing in the record to show that the respondent was not happy with the appointment of DW2, it is

clear from the meetings between the respondent, the appellant and the architect of the appellant that the respondent was not happy and not willing to work with the said DW2.

[6] Before proceeding further, let me deal with the first issue raised by the appellant before us. The appellant contended that the agreement between the appellant and the respondent was null and void because of illegality. This is stated in the memorandum of appeal as grounds 1, 4 and 10. The learned counsel for the appellant submitted that the contract is illegal because it contravened the Registration of Engineers Act 1967 ("the Act"). The learned counsel for the appellant then cited s. 2 of the Act:

> 2. Interpretation
>
> In this Act unless the context otherwise requires:
>
> "appointed date" means the date appointed for the commencement of this Act;
>
> "Board" means the Board of Engineers established by section 3(1);
>
> *"body corporate practising as consulting engineers" means a body corporate incorporated under the Companies Act 1965 which has been approved by the Board to practise as consulting engineers under this Act;*
>
> *"Engineer" means a Civil Engineer, Electrical Engineer, Mechanical Engineer or Structural Engineer or other person qualified to be registered under this Act;*
>
> "prescribed" means prescribed by regulations made under section 26;
>
> "Register" means the Register kept and maintained under section 5;
>
> *"registered Engineer" means an Engineer registered under this Act;*
>
> "registered Graduate Engineer" means an Engineer registered under section 10(1);
>
> "registered Professional Engineer" means an Engineer registered under section 10(2);
>
> "Registrar" means the Registrar of Engineers appointed under section 6(1). (emphasis added).

[7] The appellant submitted that when the contract was negotiated by PW1 (Hendra Wahjudi) on behalf of the respondent, it was PW1 who executed the contract on behalf of the respondent. According to the documents tendered during the trial, PW1 designated himself as a director of the respondent. That was how he described himself when the contract was signed. There was no evidence to show that another director or a shareholder of the respondent took part in the negotiations. PW1 was the only person who negotiated for the contract. PW1, being a foreigner, had certain restrictions imposed by the Act as can be seen from the following provisions:

> 7. Restrictions on unregistered persons and registered Graduate Engineers
>
> (1) No person shall unless he is a registered Professional Engineer:
>
> (a) Practise, carry on business or take up employment as an Engineer;
>
> (aa) Do so under any name, style or title:
>
> (i) bearing the words "Professional Engineer", "Registered Engineer" or the equivalent thereto in any other language; or
>
> (ii) bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered Professional Engineer;
>
> (b) use or display any sign, board, card or other device representing or implying that he is a registered Professional Engineer; or
>
> (c) be entitled to recover in any court any fee, charge or remuneration for any professional advice or services rendered as an Engineer.
>
> (2) Notwithstanding subsection (1):
>
> (a) A registered Graduate Engineer may with the written approval of the Board take up employment as an Engineer;
>
> ....

7A. Engineering practice by bodies corporate

(1) Notwithstanding section 7(1), a body corporate may practise as consulting engineers and recover in any court any fee, charge or remuneration for any professional advice or services rendered by it pursuant to its practice as consulting engineers carried on by virtue of this section, if it has the written approval of the Board to so practise and has been issued with a valid permit in respect thereof.

(2) Every application by a body corporate for approval to practise as consulting engineers shall be made to the Board in the prescribed form and manner and shall be accompanied by the prescribed fee.

(3) *The Board shall grant its approval for a body corporate to practise as consulting engineers, subject to such conditions and restrictions as it may deem fit to impose, if:*

(a) *the board of directors of the body corporate consists:*

(i) *entirely of individual persons who are registered Professional Engineers;* or

(ii) *of a majority of individual persons who are registered Professional Engineers and any other individual persons who are architects, quantity surveyors or land surveyors registered under any written law relating to the registration of such professions, or other individual persons belonging to a profession allied to the practice of engineering and who have been approved in writing by the Board;* and

(b) *all the shares in the body corporate are either held by the persons mentioned in paragrap[h (a)(i) or (a)(ii), as the case may be, provided always that the registered Professional Engineers shall have a controlling interest in the shares of the body corporate*. (emphasis added).

[8] The appellant submitted that s. 7(1) of the Act is a general provision prohibiting persons other than the engineers qualified under the Act to practice or carry on business or take up employment as an engineer. Section 7A(1) of the Act enables a body corporate to practice as an engineer subject to certain terms and conditions which is found in subsection (3). Amongst the terms and conditions the body corporate must consist entirely of individuals who are registered professional engineers or the majority

of the shareholders are registered professional engineers and the other shareholders are either architects, quantity surveyors, land surveyors or professions allied to the practice of engineering and who had been approved in writing by the board.

[9] The appellant submitted further that the respondent belong to the first category and not the second category of the body corporate. The respondent could not be in the second category because none of the partners were an architect, a quantity surveyor, a land surveyor or a person allied to the practice of engineering and also the approval in writing by the Board was not tendered as evidence. Since the respondent fall within the first category of the body corporate, the respondent must show that all the shareholders were at the material time registered professional engineers within the meaning of the Act. The appellant contended that PW1, being a foreigner (an Indonesian), was one of the shareholders and also a director of the respondent. PW1 was not one of the qualified persons under the Act and s. 7A prohibited PW1 to be a shareholder or a director of the respondent. The appellant conceded that PW1 could be registered as a temporary professional engineer under s. 10A of the Act which provides as follows:

> 10A. Temporary registration of foreign engineers
>
> (1) Subject to this section and such conditions as the Board may think fit to impose, the Board may, upon payment of the prescribed fee, approve the temporary registration as a Professional Engineer of any foreign engineer.
>
> (2) A foreign engineer may be considered for temporary registration if he satisfies the Board that:
>
> (a) he possesses the necessary qualification which is recognised for the practice of engineering as a Professional Engineer in the country where he normally practises; and
>
> (b) he possesses the necessary expertise and his physical presence is required in Malaysia for not less than one hundred and eighty days in one calendar year or he is a resident representative of the foreign component of a joint-venture.
>
> (3) The Board may approve a temporary registration for such period not exceeding one calendar year and may renew such temporary registration as it deems fit.

[10] The appellant contended that PW1, at the material time, was only a temporary registered engineer under s. 10A of the Act. He could only be an employee (temporary) of the respondent in respect of the project named in the certificate. In this case the project named was Radiant Visions. It was not disputed that the respondent was an international company and that PW1 was one of the directors, but with the coming into force of s. 7A of the Act, the respondent became a body corporate under s. 7A where there were prohibitions and restrictions, one of which was PW1 was not allowed to be a shareholder or to hold the office of a director. The board of directors, PW1 and the respondent knew about this and yet PW1 was allowed by the board of directors and the shareholders to negotiate on behalf of the respondent. When PW1 negotiated for the respondent for the appellant's project, he exceeded the terms and conditions of the certificate issued to him, in that he was to be an employee of the respondent only in respect of Radiant Visions. PW1 admitted he signed all the documents in respect of the appellant's project as the authorised signatory of the respondent (invoices at pp. 287-294 of AR). Subsequently, PW1 claimed that he signed those documents as a partner. The appellant contended that when PW1 did all those he had exceeded his authority as stated in the certificate and the Act. The document at p. 289 is an admission by PW1 that he was a shareholder of the respondent. (Page 138 of AR). From the documents, in particular the plans, it could be seen that PW1 reviewed all the plans ans signed submissions but he claimed that BEM did not prohibit his involvement in other projects so long as he did not endorse any plan (p. 146 of AR). PW1 went further by claiming that he could act in the respondent's other projects without approval (p. 147 of AR). I agree with the appellant that PW1 had exceeded the authority given to him under the certificate. PW1 had no authority to do all those things, in particular the negotiations and the execution of the contract. I agree with the appellant that since PW1 had no authority to do so, the contract was therefore null and void. In the present appeal, at the material time, PW1 was only licenced to undertake the project known as Radiant Visions and that also in the capacity of an employee only.

[11] In his judgment the learned judge stated that PW1 could have obtained permission to undertake the works in respect of the project. With the greatest respect to the learned judge, at the material time when the parties were negotiating for the appellant's

project, PW1 had already been issued with the certificate in respect of the Radiant Visions Project. In my view, it would be unlikely that he would be given another certificate in respect of the appellant's project. PW1, being a foreigner, is allowed to undertake only one project at any given time. This could be seen from the certificates issued to PW1 where he was given a certificate to undertake a project (a building) at Tropicana Golf Club only after he had completed his Radiant Visions Project. The learned judge was in error in assuming that PW1 could have obtained the certificate to undertake the appellant's project while he was still working for the Radiant Visions Project. Even assuming that he would get the certificate it would not change the fact that when he negotiated and signed the contract he had no authority to do so.

[12] It was the contention of the appellant that the learned judge overlooked the importance of the legislation in respect of the registration. It was not disputed that when the respondent was first incorporated, the restrictions and prohibitions on foreign engineers had not been legislated yet. There was no dispute that PW1 was the person who incorporated the respondent and he was the major shareholder. PW1 was also the managing director of the respondent. When the Act was amended, it imposed prohibitions and restrictions on foreign engineers. As a result, PW1 was not allowed to be a shareholder and a director of the respondent. In order to continue working in Malaysia as an engineer PW1 must obtain a certificate under s. 10A of the Act. The certificate itself impose certain conditions which are as follows:

1. Approval of this certificate allows the holder to work only as employee of HAINAL-KONYI (M) SDN BHD to undertake the project of mixed development at Jalan Ampang Kuala Lumpur for Radiant Visions Sdn Bhd.

2. Holder of this certificate shall not be a director/shareholder of Hainal-Konyi (M) Sdn Bhd and any other companies practising as consulting engineer.

The certificate clearly shows that PW1 could only work as an employee. He was not allowed to be a director or a shareholder of the respondent or other companies.

[13] In my view, being an employee only and on top of that a temporary one for a particular project, the power of PW1 differed substantially from that of a director or a shareholder. As an employee of a particular project, PW1 has to take instructions and

directions from the director, shareholders or officers of the respondent and that also in respect of the project he was employed. Apparently, in the present appeal, it was the other way round, it was PW1 who gave instructions and directions to the shareholders and directors of the respondent such as the instructions and directions to DW2. It shows that PW1 had exceeded the authority given to him and acted in contravention of the prohibitions and restrictions imposed in the certificate issued to him. The appellant contended that as an employee, PW1 could not negotiate or enter into a contract with any party. The appellant submitted that any contract by an unauthorised engineer is illegal and he cited *Raymond Banham & Anor v. Consolidated Hotels Limited* [1976] 1 MLJ 5 and *John B. Skilling & Ors. v. Consolidated Hotels Ltd.* [1979] 2 MLJ 2.

[14] In *Raymond Banham & Anor v. Consolidated Hotels Limited*, the plaintiffs, partners of a firm of consulting Mechanical and Electrical Engineers practising in Hong Kong, rendered professional services in respect of the Hotel Sheraton project owned by the defendants. This was pursuant to a contract made between the plaintiffs and the defendants. The plaintiffs claimed for the sum of RM106,250 being 85% of the value of work completed by them. The defendants contended that the said contract was illegal and unenforceable in court because the plaintiffs were not registered as required by the Professional Engineers Act (Cap. 225). It was held: (1) the plaintiffs were engaged in professional engineering work in Singapore even though the drawing of plans was carried out in Hongkong; (2) an overseas professional engineer who undertakes emoployment as such in Singapore even in respect of one isolated project as this one would be contravening the provisions of s. 18 should he fail to register himself unless he engages in such employment under the direction or supervision of a registered professional engineer; (3) services performed by the plaintiffs under the aforesaid contract were therefore illegal in that the plaintiffs never took steps to get themselves registered beforehand nor to engage in such services under the direction or supervision of a registered professional engineer; (4) the plaintiffs' claim was therefore unenforceable notwithstanding the defendants' own participation in this illegal contract.

[15] In the case of *John B. Skilling & Ors. v. Consolidated Hotels Ltd.*, the appellants sought to claim a sum of RM143,358.28 from the respondents for professional services rendered to the respondents pursuant to an agreement between the parties dated

19 August 1971. The parties had agreed that the proper law of the said agreement was the law of the State of Washington. The lower court dismissed the claim on the ground that the said agreement was void and unenforceable. The appellants were partners in a firm of consultant engineers practising in the United States. They were, however, not registered as required under ss. 18 and 19 of the Professional Engineers' Act (Cap. 225). The Court of Appeal dismissed the appeal and held that: (1) the said agreement was illegal as it infringed the provisions of ss. 18 and 19 of the Professional Engineers Act; (2) a court will not enforce a contract which by its own *lex fori* it would not enforce because it was tainted with illegality. In this connection the foreign law factor is irrelevant.

[16] In the present appeal, the appellant contended that PW1 was directly involved with the respondent though the Act prohibits him from doing so. PW1 claimed in his evidence that he was a registered engineer and technical director of the respondent. PW1 also claimed that he was the executive director and incorporated the respondent. The appellant further contended that when PW1 claimed that he was the one who incorporated the respondent established the fact that he was a shareholder (p. 209 of AR) and as such, the alter ego of the respondent. PW1 did not deny that he was the one who concluded the agreement with the appellant (pp. 210 of AR). (Page 265 of AR) The agreement shows that it was signed by PW1 and designated himself as director of the respondent. He also signed the letter of appointment with the appellant. (Evidence at p. 213) PW1 also attended site meetings with DW2 in respect of the appellant's project. PW1 stated in his evidence that he was the senior engineer in the respondent and DW2 was his subordinate. (Page 219 of AR) PW1 admitted that he could only sign plans for the appellant's project if the certificate issued to him was in respect of the appellant's project, but he failed to adduce any evidence in respect of this. (At p. 219 of AR) PW1 also admitted that the certificate issued to him was limited to the Radiant Visions Project only. During cross-examination (at pp. 134-135 of AR) PW1 admitted that he was recorded as an employee of the respondent and on a temporary basis. As an employee he could not act for the respondent in any capacity in all the other projects undertaken by the respondent except the Radiant Visions Project. When he negotiated and signed the agreement on behalf of the respondent

A he had no authority to do so. The evidence shows that no other personnel of the respondent took part in the negotiations and the conclusion of the agreement with the appellant.

[17] At the time when the negotiations and the conclusion of the
B agreement, the appellant did not know that PW1 was not a director, a shareholder or an officer of the respondent and that he had no authority to act for the respondent. Though PW1 claimed that he was authorised by the respondent to do so, the letter of authorisation was never produced.

C

[18] Looking at the evidence as a whole, I am in agreement with the appellant that PW1 was the alter ego of the respondent just because he was the one who incorporated the respondent. He should have stopped doing so when the Act was amended
D because by then he was prohibited from being a shereholder, a director or an officer of the respondent. He should not hold himself as such. Surprisingly, none of the shareholders, the directors or the officers of the respondent stopped PW1 from doing so. This is understandable because the evidence shows that
E PW1 was the only person with the respondent who could allocate the shareholding, appoint the directors, appoint and terminate the engineers within the respondent in total contradiction to the prohibitions imposed by the Act and the certificate issued to PW1. It is also apparent that PW1 was the only person with the
F respondent who could negotiate and conclude a contract for the respondent. The Act did not permit PW1 to do so. From the evidence it is clear to me that the agreement with the appellant was concluded by PW1 on behalf of the respondent. The Act did not permit him to do so. For that reason, I find that the
G agreement was illegal.

[19] The second issue raised by the appellant was in respect of the number of registered engineers attached to the respondent when DW2 tendered his resignation to the respondent. The appellant contended that under the contract the respondent
H should assign two registered engineers to the appellant's project at all time. The evidence shows that when Azman bin Ahmad left the respondent there was no replacement for him. There was already a breach by the respondent. When DW2 tendered his resignation the respondent failed to inform the appellant the names of the
I registered engineers to replace Azman and DW2 as consultants. The appellant raised the issue of the replacement of DW2 with

the respondent, ie, PW1. It is apparent to me, even at that time the appellant did not know that PW1 had no authority to represent the respondent.

[20] The appellant gave evidence that it was necessary for the project to be completed within time so that they would not be penalised for late delivery. It was the appellant's contention that when DW2 tendered his resignation, there was only one registered engineer left with the respondent, ie, PW2 (Wong Loo Min). PW2 was, at that time, assigned to the respondent's projects in Johor Bahru and Singapore which were still going on. The appellant further contended that PW2 could not be assigned to the appellant's project because the appellant's project required the engineer to be at the site at all time because meetings chaired by the architect were held at short notices. The registered engineers assigned to the appellant's project must be at the site at all time and they must devote their full time with the appellant's project. For that reason, the appellant submitted that PW2 would not be suitable because PW2 had to divide his time between the projects in Johor and Singapore and also the appellant's project in Kuala Lumpur. The only other engineer available was PW1 who was issued with a certificate to be a temporary employee of the respondent in respect of the Radiant Visions Project.

[21] For the above reasons, the respondent did not give the name of the registered engineer to replace DW2. Sensing that there would be delay in completing their project because there was no replacement for DW2, the appellant invited PW1 to attend a meeting with the appellant and DW1 (the architect in charge). At that meeting, the appellant and DW1 made a suggestion that DW2 be allowed to continue with the appellant's project. The appellant and DW1 told PW1 that they were happy with DW2. The appellant also informed PW1 that they were willing to honour the contract with the respondent in that the respondent be paid the full sum stated in the contract and DW2 be paid separately by the appellant. PW1 was given time to think about it but the reply must be made before the appellant's representative left for his overseas trip. The respondent did not reply to this. As a result, the appellant terminated the agreement with the respondent and appointed the firm of Azman, Lim & Associates to be their consultant engineer.

[22] In his judgment the learned judge states as follows:

> The defendant argues that it terminated the agreement because of the fact that once Lim (DW2) had tendered his resignation as of 17.4.96, and since the other engineer, Azman, had already earlier left the plaintiff, the plaintiff had committed a breach of the agreement by no longer having the expertise of registered engineers to carry out the works on the said project and in failing to appoint any other registered engineers after the resignation of DW2 and Azman. This is a very surprising stand taken by the defendant. After all, the said Lim was still contractually in service when the defendant unilaterally terminated the contract. Lim would have to work up till 16.7.96. The defendant jumped the gun and no doubt with a reason. The said Lim had now teamed up with the new firm and the defendant had engaged this new firm in which Lim and Azman are the only two directors. In any case in its letter of termination of the contract dated 7.5.96 the defendant never mentioned the true reason pleaded in evidence. The evidence given in the letter was that the defendant intended to change the consulting engineers. It never contended that the plaintiff lacked local experts.

In the above passage, the learned judge looked at the termination of the contract by the appellant unfavourably and blamed DW2 and Azman for the termination. Looking at the evidence, it is not disputed that DW2 tendered his resignation letter dated 17 April 1996 and the resignation was to take effect three months from that date. PW1 accused DW2 of removing certain documents from the respondent's office. This was denied by DW2. (The correspondences in respect of this are found at pp. 274-277 of AR). DW2 could not tolerate PW1 anymore and as a result DW2 wrote a letter dated 1 June 1996, the contents are as follows:

> Re: Notice of Resignation
>
> Further to my letter of resignation, please be informed that I will not be reporting for work effective from 3 June 1996. For the insufficient notice served, kindly let me know the compensating amount in lieu of insufficient notice with due consideration from my entitled balance of leave day accrued.
>
> Any inconveniences caused is regretted and I wish to thank the management and staff for all past assistance and cooperation rendered.
>
> Trusting the above is in order.

By that letter, DW2 made it clear that he was resigning with immediate effect *in lieu* of the three months. The learned judge was obviously in error when he said DW2 was still contractually in service till 16 July 1996. He ignored the letter dated 1 June 1996 which superseded the letter dated 17 April 1996. By the letter dated 1 June 1996, DW2 made it clear that his resignation would take effect on 3 June 1996.

[23] The appellant contended that they terminated the agreement because the respondent had committed several breaches and not necessarily as stated by the learned judge in the above passage. The appellant pointed out that the first breach by the respondent was in respect of two engineers assigned to the appellant's project. When Azman left, the respondent failed to assign another registered engineer to take his place.

[24] When DW2 tendered his resignation, the respondent did not name his replacement. If I am not mistaken, when DW2 tendered his resignation PW1 asked DW2 to stop work immediately in respect of the appellant's project. PW1 knew that the appellant wanted to complete their project in time. By not naming the replacement of DW2 there was no consultant engineer assigned to the appellant's project. According to the evidence, the respondent did not assign any engineer until the appellant terminated the agreement. This was the second breach by the respondent. It was obvious to the appellant that when the respondent failed to name the replacement for DW2, the appellant's project would be delayed.

[25] In view of the breaches by the respondent, I am of the view that the appellant is entitled to terminate the agreement. The appellant made it clear to the respondent that the appellant wanted to retain DW2 as the consultant engineer. In fact, at the meeting with PW1 the appellant made it known to PW1, as respresentative of the respondent, that they wanted DW2 to continue with the project until its completion and they were willing to pay DW2 separately, on top of what they had to pay the respondent under the agreement. For some reasons best known to them, the respondent refused to accede to this suggestion.

[26] The next issue raised by the appellant was the number of registered engineers attached to the respondent who could take over from DW2 when DW2 tendered his resignation. The learned judge in his judgment states as follows:

> It is my finding therefore that the defendant's contention that the plaintiff had no qualified engineers to take over the works under the contract is totally unfounded, misconceived and without basis. On the contrary, there is evidence that the plaintiff was at all times ready and prepared to proceed with the works and had hired another qualified engineer, Mohd Nazari bin Khalidun, on 27.5.96. I accept PW1's explanation that he could have taken over the project from DW2. Although PW1 was at the material time a registered engineer, nevertheless his registration (because he is a foreigner) was specifically only for another project, namely, Radiant Vision Sdn Bhd. However, there was nothing to prevent PW1 from applying to be registered as the engineer for this project or he could have obtained the services of any of the registered engineers in the plaintiff to do so. I am in no doubt that the true reason for the defendant terminating the plaintiff was in order to pass on the said works to DW2 who had left the firm. DW3 admitted that he was earlier informed by DW2 that he, DW2, would be resigning from the plaintiff and that he would be joining the new firm. There is evidence from PW1 that DW2 had in fact taken with him the computer diskettes and hard copies of the plans for the project from the plaintiff when he left the plaintiff.
>
> I am satisfied that the defendant's termination of the contract was indeed unlawfull, and I find that at the time of the termination, the plaintiff was never in breach of its obligation. On the contrary, DW1, who was the architect for the project testified under cross-examination that the plaintiff had performed its obligations satisfactorily. There were also, up to the date of the termination no complaints in respect of the plaintiff's performance and obligation. DW3 himself testified that prior to the termiantion there was no disruption or delay in the plaintiff's services.
>
> In fact, there is no express terms in the contract that the plaintiff must have at all times engineers who are registered with BEM. The defendant never challenged PW1's evidence that he was the senior engineer with the plaintiff and that DW2 was working under him. The fact that PW1 was overseeing the entire project relating to the plaintiff's obligations under the contract was never challenged. Further, the defendant has not pleaded that there was an implied term in the contract that the plaintiff must have a registered engineer to perform the obligations of the plaintiff under

the contract. PW1 has given evidence which I accept (in the absence of any rebuttal evidence), that the BEM in fact do not prohibit unregistered engineers from carrying out work so long as they do not endorse the submission of drawings to the local authorities.

[27] The appellant contended that the learned judge was in error when he said that "there is no express terms in the contract that the plaintiff must have at all times engineers who are registered with BEM". It is obvious the learned judge misread the Act in particular s. 7 where it is stated that no person shall practise, carry on business or take up employment as an engineer unless he is a registered professional engineer. Section 2 defines "registered engineer" to be an engineer under this Act. In my view, an engineer could only practice as an engineer or a professional engineer once he registers himself with BEM under s. 7 of the Act. In the agreement between the parties, when it states that the engineer meant an engineer registered under s. 7 of the Act. The learned judge was indeed in error when he stated in the judgment the above.

[28] The second error made by the learned judge was when he said that "the defendant never challenged PW1's evidence that he was the senior engineer with the plaintiff and that DW2 was working under him". In my view, there was no necessity for the appellant to challenge that because the evidence speaks for itself. PW1, being a foreigner, cannot be a registered engineer under s. 7 of the Act. He could only be issued with a certificate under s. 10A of the Act to be a temporary registered engineer in respect of a particular project. He would only be allowed to be employed by the respondent as an employee. As I have stated earlier, at the material time, PW1 was only an employee of the respondent in respect of the Radiant Visions Project. Once the project is completed he could not be in the employment of the respondent unless another certificate was issued to him in respect of another project. At the material time, PW1 was only permitted to be with the Radiant Visions Project and not with other projects and certainly not with the appellant's project. Looking at the evidence, how could PW1 claim that he was the senior engineer of the respondent when he was only employed by the respondent as an employee on a temporary basis. PW1 could not be a senior engineer because he was only an employee in respect of the Radiant Visions Project only.

[29] In respect of the registered engineer with the respondent, the learned judge accepted the evidence of PW1 of the appointment of Mohd Nazari bin Khalidun on 27 May 1996. DW2 tendered his letter of resignation on 17 April 1996. As can be seen, the appointment of Mohd Nazari bin Khalidun was after DW2 tendered his resignation. The issue raised by the appellant was the number of registered engineers attached to the respondent when DW2 tendered his resignation. Obviously, Mohd Nazari bin Khalidin was not one of those registered engineers with the respondent. He came later. From the evidence, PW2 was the only registered engineer with the respondent when DW2 tendered his resignation. As such the learned judge was in error to assume that Mohd Nazari would be assigned to the appellant's project. In my view, the learned judge should consider the events on the termination day and before, and not subsequent to the termination date. For this, I am of the view that the learned judge had committed another error.

[30] In the present appeal, the issue was whether the appellant was justified in terminating the agreement. As stated in their statement of defence, the appellant terminated the contract because of the breaches committed by the respondent. The passage by the learned judge which I cited above shows the judge did not consider whether the respondent had committed the breaches alleged by the respondent at the time of the termination, but more concerned as to how the respondent could remedy those breaches. In other words, the learned judge had accepted the fact that the respondent had committed the breaches but the respondent could remedy them. This is where the learned judge was in error.

[31] It is not disputed that at the time when DW2 tendered his resignation, PW2 was the only other registered engineer left with the respondent. PW1 gave evidence that he could bring PW2 to take over from DW2 in respect of the appellant's project. I have pointed out earlier as to why PW2 was not suitable to replace DW2. There is no need to repeat them. Furthermore, as pointed out by the appellant, under the agreement the two consultant engineers must work full time at the appellant's project. DW1 in his evidence said that any time he would call for a meeting to solve any problem or difficulty. Those meetings, in some cases, were called at very short notices. PW2 would not be available.

[32] DW1, the architect in charge of the appellant's project, in his evidence stressed the good relationship between the parties. DW1 also stated that DW2 was the only engineer from the respondent who had been with the appellant's project throughout until his resignation and his relationship with the others involved in the appellant's project was good. DW1 also stated that it would be difficult for another engineer to take over from DW2 in the midst of the construction.

[33] In my view, PW1 knew that it would not be possible for PW2 to take over the appellant's project from DW2 because to take charge of three projects at three different places would be very difficult for a single person to handle. That was the reason why PW2's name came up as a replacement for DW2 only during the trial and not before. It was not possible for PW1 to take over from DW2 because of the prohibitions and restrictions imposed by the Act and the certificate issued to him. I agree with the learned counsel for the appellant that when DW2 tendered his resignation, PW2 was the only registered engineer left with the respondent. I wish to add, because there was only one registered engineer left with the respondent and he was committed to the projects in Johor Bahru and Singapore, it was not possible for him to take over from DW2.

[34] The learned judge in his judgment pointed out that there was no complaint against the respondent's work in respect of the project and as such there was no reason for the appellant to terminate the contract. I agree with the learned judge that there was no complaint against the respondent's work in respect of the appellant's project but after considering the evidence, I do not agree with his conclusion that "there was no reason for the appellant to terminate the contract". From the beginning DW2 and Azman bin Ahmad were assigned to the appellant's project. After Azman resigned, DW2 carried on alone since no replacement for Azman was made by the respondent. No other engineer was assigned to the appellant's project. So, for all intents and purposes, DW2 was the only one assigned to the appellant's project. So, when it was said that there was no complaint against the respondent's work, it means that there was no complaint against DW2's work. In fact, the appellant and DW1 made it known that they were satisfied with the work of DW2 and for that reason the appellant insisted that DW2 be allowed to continue with the appellant's project even though DW2 was not in the employment of the respondent anymore. When the

respondent refused, the appellant terminated the agreement in order to secure the services of DW2. The learned judge should have seen the "no complaint" in this light and not as what he had stated.

[35] For the reasons I have stated above, the appellant had no choice but to terminate the agreement on the grounds stated above.

[36] We have given our unanimous decision earlier after hearing the parties whereby we have allowed the appeal with costs here and below. The deposit is hereby refunded to the appellant.

[37] I now give my reasons for allowing the appeal. My learned brother, Abdul Kadir Sulaiman FJ has seen this judgment in draft and expressed his agreement. My learned brother, Mohd Noor Ahmad FJ, has since retired and has no opportunity to see the judgment in draft.